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FOI IN THE U.S., 1960

Paul Fisher, executive secretary of the Freedom of Information Center at the University of Missouri School of Journalism, gave this brief roundup of the climate for freedom in the United States in 1960, including some specific instances of how the FoI movement has weathered it, at the 75th Diamond Jubilee meeting of the National Editorial Association in Minneapolis on November 10-12, 1960.

A few paragraphs have been added where updating seemed essential.

Generally, the climate for civil rights in 1960 seems to have been no better or worse than it has been in the years since McCarthy and the Korean War. It was the year the mayor of New York City refused a citizen the right to speak in that city, and was upheld in court. True, the citizen was a self-declared fascist. A congressional committee clobbered an English critic because his attitude toward Cuba did not, as the committee pointed out, square with that of President Eisenhower. The same committee pressed an American scientist — a Nobel Prize winner — for a list of names which he refused to give. It appears he is not to be openly punished, though some speeches he was to make have been canceled. An elderly clergyman, formerly a teacher at Yale, has sat out most of the year in a New Hampshire jail because he did not give a list of names the state's attorney general wanted. Punishments for belief and association, ranging from ridicule to imprisonment, brought no popular outcry.

Specifically . . .

As for the right to know, specifically, if it enjoyed any spectacular advance that would be in the suspension of equal time provisions during the Presidential campaign which may be the first step in permanent removal of this control of the radio-TV industry. The cases of the state of Alabama against the New York *Times*, which I shall mention later, await final decisions, but if the *Times* loses — there is that possibility — then 1960 will be the year of inception of a major setback to the right to know.

Intending as I do to confine myself to matters immediate to people in the newspaper business, I make only the briefest mention of the fortunes of freedom of information befalling some of the other communications businesses. Dozens of fraternal, religious, and private citizens groups variously proscribed books — often by lists — resulting in removals from high school libraries and book stalls. Police lieutenants and sergeants, who may well make up our largest corps of literary critics, bore down on magazines and paperback books in most cities of size. Pressure mounted to enact into state statute juvenile-adult classification systems for motion pictures. Advertising, as ever, was under sharp attack and, this year, study by state commissions.

It may be that out of a complex of reasons — suspected and proven instances of dishonesty and obscenity paramount — resentment against communications generally was forming in the consciousness of the American people. Whether from outside pressure or not, certainly there was much talk in the industries, most notably, perhaps, in advertising, of self-regulation, of the ethical and social responsibilities of communicators.

Threats, Promises, Tendencies

Coming now to the restrictive definition of freedom of information as the right to information from the branches of government, the newsman's particular concern, I find 1960 to be one starred by threats, promises, and tendencies for the FoI movement rather than by any definitive actions. It has been, of course, a political year. FoI got into neither dialogue, monologue, nor great debate. It did get into the Democratic Party's platform, which condemned information practices of the executive branch:

> We reject the Republican contention that the workings of the government are the special preserve of the Executive.
>
> The massive wall of secrecy erected between the Executive branch and the Congress as well as the citizen must be torn down. . . .

The Republican platform was silent on the subject.

Attempts to Amend Administrative Procedure Act

This year in Washington, Rep. John E. Moss and the late Sen. Thomas E. Hennings, Jr. continued their attempts to do something about the public information section of the 1946 Administrative Procedure Act whose fuzzy wording makes it a strong support for the plea of executive privilege, though this was never the intent of the Act. Senator Hennings's revision of the Act — he had been offering revisions since 1957 — went to the Judiciary Committee in January where it remained tabled at the time of his death. Very recently, as you know, the Moss Committee has circulated a draft proposal amending the Procedure Act. It is proposed that any individual denied a federal record — there are certain exceptions — be allowed to institute mandamus proceedings to force inspection. The revision also states that nothing in the information section be understood as authority to withhold information from Congress — in short, denies the executive privilege plea, which is a plenty big denial. On past performance, of both the executive branch and Congress, it would appear the proposal faces rough sledding.

(Maybe things will change with the new administration. Vice-President-elect Lyndon B. Johnson told the annual convention of the Associated Press Managing Editors Association that although no "ridiculous promise to conduct all governmental affairs in a goldfish bowl," the "fullest possible freedom of information" is expected for the Kennedy administration. Johnson further stated that "Senator Kennedy intends to establish an effective governmental machinery to support the public's right to know.")

The Eisenhower administration, as you well know, insisted on very strong exercise of the right — the very questionable right — of the executive to withhold. The General Accounting Office, bookkeeper to Congress, ran up against the plea on countless occasions when it sought figures on overseas aid evaluation reports, and the like necessary, the GAO claimed, to the performance of its duty.

Use of 'Privilege' With Prestige Polls

One of 1960's most publicized instances of the use of executive privilege to withhold information was the "leak" of the prestige polls conducted overseas by the United States Information Agency. Both the New York *Times* and the Washington *Post,* at the close of the political campaign, "obtained" and published three classified prestige surveys which found the U.S. prestige decline to be continuing and accelerating. Of these three surveys, two of them were classified "confidential" and the other carried the higher classification "secret."

White House Press Secretary James C. Hagerty said the "document" in question was secret, describing it as "an internal, low-level staff paper." He explained that the decision to withhold the information was reached "under policies approved by the President pertaining to internal working papers of the executive branch of the government."

Implying the reason for the attempt at classification, the Washington *Post* editorialized on October 27, 1960, that

> the administration is concealing bad news — from Congress as well as from the public. The results of the surveys are said to have been classified as a matter of general policy. Maybe so. But it is a not unreasonable suspicion that if the findings had been favorable, ways would have been found to make use of the results in the campaign.

The clamor surrounding prestige poll secrecy drowned out concurrent charges that the government was concealing the bad news about October unemployment, contrary to its practice in the election years of 1954, 1956, and 1958, when, according to Washington *Post* reporter Bernard D. Nossiter, "the Government rushed out some cheerful job figures on the eve of the voting."

AFL-CIO President George Meany said there was a special election year custom of speeding publication of good October figures to get them to the voters before they went to the polls. Officials released no such figures before the 1960 election, and when they were released after the election, they were bad, as predicted.

FoI and Congress

If we look on Congress as a champion of the right to know, we do wrong, I think. As usual in the last half-dozen years or so, Congress closed about a third of its committee meetings, and *Congressional Quarterly* score-sheets indicate, generally, the more important the committee the higher the incidence of secret sessions. Congress, it must be recalled, has for three years been pressed by Moss and Hennings to act on the Administrative Procedure Act amendment. Again this year, as in the past, a rider to the foreign aid bill which would have required that Congress be supplied with a breakdown of expenditures was defeated in the Congress.

The rigid prohibition of cameras in Congress made laughable — or ridiculous — the request of the ABC network to cover the 1960 rump session. The request seems not to have been dignified by an answer.

Courts and Press Drift Apart

It would not be difficult to support the statement that courts and press seemed to drift apart in 1960. By closing records in a civil suit at the request of one of the parties, federal judges in Detroit reminded some and made most of us realize for the first time that the U.S. Judicial Code as revised in 1945, by saying nothing concerning inspection, left access to records up to the rule of each court.

As could be predicted on the basis of like events in the past, coverage of the Finch murder case in California did not help court-press relations. Hard, bitter statements by jurists have been plentiful — even from Justice Douglas, a zealous protector of a free press. It is understood that in Oregon, in California, and in Florida — a list not to be taken as all-inclusive — movements are being pushed by bar groups to limit pre-trial coverage, to tighten the contempt law. A New York newspaper executive has suggested more legislation on contempt may be in the interest of the press in that the threat of a capricious judge is thus lessened. And to many photo newsmen this year swept from the sidewalks and streets surrounding his courthouse, Judge Durwood Pye of Atlanta, Georgia, has appeared capricious. By not hearing the case, the Supreme Court has in effect upheld Judge Pye.

It appears that photo newsmen not only have to watch the geographic position, they also have to consider the dimension of time as well. The Florida Supreme Court has upheld a decision of Duval County Circuit Court prohibition of photography for one hour before or after sessions in any part of the Court house. According to a report from *Editor & Publisher*, the "before and after rule is unique in Florida."

Press Takes Less Recourse to Legislation

On its side, the press showed a reluctance in 1960 to go to the law to solve problems of access. The bloom seems to have passed from the movement to adopt open meeting and open record statutes. Indeed, so far as I can find, only Nevada passed legislation in 1960, but I would wait for the annual report of Sigma Delta Chi's FoI Committee before making this a positive statement. Many states, of course, have the statutes on the books, and, too, it has been an off-year for most legislative assemblies. On the other hand, states with the statutes have suffered some disenchantment. Passage of the law does not seem to equal its observance. California with its specific, individualized series of access statutes has been having trouble with their enforcement — we know this because California newsmen and associations insist on making the laws work, and so cases of withholding and such end runs on the law's line as holding pre-council meetings at drive-in restaurants made news in that state.

Ohio, with its enviable FoI record, had last month from its Committee on Public Information the recommendation that "the best procedure . . . (is) to continue writing public records provisions into individual laws . . ." and to stay away from all-inclusive statutes.

Just about a year ago this time, considerable pressure began to build for reporter privilege legislation at the federal level as well as at state level to match the dozen or so states with such a guarantee. The pressure vanished in 1960. A few weeks ago a lady reporter in Colorado was found in contempt — eventually given a suspended sentence — because she would not tell a court the source of her information. The incident was reported, but engendered none of the heat of last year's Marie Torre case. (The Colorado publisher shows every intent to push his reporter's case.) No one clamors for a shield or privilege statute. Second thought has indicated to newsmen and their associations — this is on their own testimony — that the reporter is in an indefensible position when he claims a right under the First Amendment that other citzens do not claim, thus making it to appear that the amendment is a special right which is already the reaction of many citizens to the amendment — with regrettable consequences for freedom of information.

Reporting Across State Lines

The right to report across the states lines faced a challenge in 1960 as the New York *Times* battled libel suits in Alabama because of a series of articles on the race problem in Birmingham-Bessemer area by Harrison E. Salisbury and because of a full-page advertisement seeking funds for legal defense of the Rev. Martin King, at the time charged with state income tax delinquency.

The advertisement case came before a state court in November, and $500,000 was awarded a plaintiff by a Montgomery jury. As of now, the Salisbury articles case is pending in the federal court at Bessemer.

Two judges found that Alabama courts had the right to try an out-of-state enterprise. Montgomery Circuit Court Judge Walter B. Jones contended that the *Times* was doing business in Alabama by gathering news, soliciting advertising, and selling newspapers in Alabama. Federal Judge H. H. Grooms ruled that the Salisbury case could be tried in Alabama since the articles resulted from "work or service" performed in Alabama while gathering information.

As a *Times* reader pointed out, the controversy in Alabama is not merely the concern of the paper but, properly, of the American people. Should the *Times* lose its case, he said, papers of "less moral and financial strength" would think twice before laying themselves open to similar actions.

Commenting on the case, *Times*' publisher Arthur Hays Sulzberger said "each of these decisions raises an issue of grave public importance in connection with the reporting by news media across state lines from areas in which tension exists."

A Year for Talk of Commissions

If the press seemed more willing to take its chances in the gathering of information on its own competence, there were those who were less willing to take their chance with the press. Mounting in 1960 was talk of a commission to "evaluate," to "assay," to "judge the performance of" — phrase depending on the proposer — the press.

A commission was suggested for radio-TV — by an advertising man — and for advertising, by an advertising man. Among those suggesting a press commission was a newsman — formerly, as of now — of the highest reputation: Harry Ashmore, late of Little Rock, Ark.

As a nation, we do seem to be in for a period of self-criticism if not self-loathing. We stand charged by ourselves with lack of national goals, with slothful living, with winking at corruption, and so forth. If the people and their leaders actually are going to make a sustained criticism of the culture, then the communications industries, of course, will not escape it. We may yet have communications commissions — there was sign of it in 1960 — how composed and how sustained and with what concomitants for the freest flow of information being questions whose answers can only be guessed at. This, you will be happy to learn, I do not propose to do.

Waning Concern

In a time of troubles, the flow and stoppage of information from governors to governed seemed minor matters. For those of us who work at the Center, this sums up the FoI situation this year in the United States. I suspect, looking on that part of the record we have been able to compile, that the movement interests the communications industries less. There has not been so much speaking on the subject as in the past. Maybe the subject is talked out. Research completed and in progress at schools and departments of journalism as reported in *Journalism Quarterly* indicates waning concern over the FoI problem areas. Commonest student request for information to the FoI Center, by the way, is for background on Canon 35, a situation that has been largely static now for a number of years. Maybe FoI as a field of investigation has been worked out.

I speak very personally here when I say I have the late afternoon feeling that the problem of the right to know is old hat, indeed that it is not a problem at all so far as the people for whom it is claimed are concerned who already have all the information from seats of government that they need and rather more than they want.

So, here at the end, I am back to the people, whoever and whatever they are, which is where I started. About three years ago, as some in this audience will recall, the Freedom of Information Center at the University of Missouri set out to learn and to chart the currents of information. The learning goes on, and a long job it is likely to be since those of us at the Center are forever distracted — cannot fail to be — by wonderment about the changing reactions and foibles and values of the American people.

The Tensions and the Tests

The frenzy that moved many Americans on the dismissal of General Douglas MacArthur in the spring of 1951 prompted Frederick Lewis Allen to put down a basic question and to make a basic observation on the American people in his book *The Big Change* published a year after the MacArthur frenzy. Allen wrote:

> . . . How can we maintain mutual trust, and an invigorating freedom of thought and expression, in a nation which for an indefinite time must carry heavy and uncertain responsibilities abroad, and meanwhile be unrelaxed in its armed strength?
>
> We are by nature a sanguine people, but never before have we been subjected to the sort of prolonged strain that we feel today, and our patience, humor, and courage are being sorely tested.

As we all know, the strain has continued in force th
near decade since Allen wrote, and as I read and a
spoken to I understand that abatement of our tensions
unlikely for some time to come. I think, looking at it fro
the numb and dying side of 1960, that we must all wa
a while before the right to know is matched by a popula
outgoing joy in knowing which alone will make the rig
full-blown and inviolate. All that we have to assure
that this will be so in time — all we have ever had
America — is the belief that the people, given time, w
choose rightly. What must give us pause is that for th
right choice, with time, the people must have knowledg

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